of this chapter shall not apply to wines produced from grapes grown in this state, while the same is in the hands of the producers or manufacturers thereof." Art. 5060*i*. This article is thought to invalidate those which precede. The matters of discrimination relied upon are the tax and the requirement of the bond. It may be proper to add that there was a demurrer, setting up generally that the statute was unconstitutional because of this article, but until the motion for a new trial was made there was no sufficient setting up of a defence under the Constitution of the United States. *Kipley* v. *Illinois*, 170 U. S. 182. *Layton* v. *Missouri*, 187 U. S. 356.

The main argument addressed to us was rested on the notion that the statutes discriminate unconstitutionally between two classes of persons in the State, naturally existing there, as in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, there was a discrimination with regard to trusts in favor of producers and raisers of agricultural products and live stocks. This argument seems to us a fallacy. Farmers and stock raisers are classes naturally existing in the community, carrying on distinct callings and not likely to be engaged in anything else. Hence, although farmers and stock raisers equally with others were prohibited from forming trusts for other purposes, to permit them to form trusts in their regular business was practically and in fact to discriminate between two classes and others. The case was discussed throughout on the footing of classification. But, so far as we know, there is no natural distinction of classes among liquor sellers—one class selling their own domestic wines alone, another selling all intoxicants except domestic wines. The statutes regulate the doing of certain things, which presumably all liquor sellers would prefer to be free to do. Therefore whatever other objections there may be to them they do not deny the equal protection of the laws by forbidding without justification to one what they permit to another class.

There is one slight qualification necessary to what we have said. It is true that there is granted to the producers and manufacturers of wine from grapes grown in Texas an immunity in respect of that wine which is not granted to other sellers of the same wine. To that extent, but to that extent alone, favor is shown to a class. But this is not the class discrimination put forward and insisted upon. The attack is not mainly on the distinction between producers and other sellers of domestic wine, but upon that between those producers and the sellers of other wine. The latter, as we have said, is not a true class distinction. Whether there is a difference in the scope of a State's general power to legislate and its power to tax or not, (*Kidd* v. *Pearson*, 128 U. S. 1, 26, *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 562, 563,) the former does not need an extended defence so far as the Fourteenth Amendment alone is concerned. See *American Sugar*

Refining Co. v. *Louisiana*, 179 U. S. 89; *Reymann Brewing Co.* v. *Brister*, 179 U. S. 445; *St. John* v. *New York*, 201 U. S. 633.

That part of the Fourteenth Amendment which forbids the abridgement of the privileges or immunities of citizens of the United States was not referred to or relied upon in the motion for a new trial or in the assignment of errors before the Court of Civil Appeals. It is mentioned for the first time in the assignment of errors before this Court. *Chicago, Indianapolis & Louisville Ry. Co.* v. *McGuire*, 196 U. S. 128, 132. In view of the decisions we hardly suppose that the omission was by mistake. *Bartemeyer* v. *Iowa*, 18 Wall. 129. *Crowley* v. *Christensen*, 137 U. S. 86. *Giozza* v. *Tiernan*, 148 U. S. 657. *Cronin* v. *Adams*, 192 U. S. 108. The truth is that the Fourteenth Amendment does not touch the case, standing alone, and, if so, other provisions of the Constitution which were not invoked cannot be brought in now under cover of the reference to the Fourteenth Amendment to give the latter a more extensive application to the case than it would have when taken by itself. If the States were restricted by the Fourteenth Amendment only, and saw fit to encourage domestic production, or thought to promote temperance, or to help to secure pure wine, by statutes such as those before us, there would be nothing to hinder them. If the statutes are open to objection as improperly interfering with commerce among the States, *Tiernan* v. *Rinker*, 102 U. S. 123, *Walling* v. *Michigan*, 116 U. S. 446, the right which springs from Art. 1, § 8, of the Constitution cannot be used to enlarge for the purposes of this case the privileges and immunities or the equal protection of the laws secured by the Fourteenth Amendment. *Dewey* v. *Des Moines*, 173 U. S. 193, 198. The converse case of a right set up under Art. 1, § 8, and an attempt to support it by the Fourteenth Amendment, was decided in *Keokuk and Hamilton Bridge Co.* v. *Illinois*, 175 U. S. 626, 633. See further *Harding* v. *Illinois*, 196 U. S. 78, 86.

It is proper to say that Art. 1, § 8, is referred to in the assignments of error before the Court of Civil Appeals and before this Court. But it does not appear that the Court of Civil Appeals dealt with the point and probably it refused to do so on the ground that the section was not relied upon before the trial Court. We cannot say that it erred, even if it did, unless that ground is excluded. *Jacobi* v. *Alabama*, 187 U. S. 133. *Erie Railroad* v. *Purdy*, 185 U. S. 148. The case was argued before us on the Fourteenth Amendment alone, and although there is some slight reference to interference with commerce in one of the briefs, it is rather in aid of the argument based on *Connolly* v. *Union Sewer Pipe Company*, 184 U. S. 540, than as an independent point. At all events the question is not open here.

We believe that we have said enough to dispose of the cases. Whether, even if the statute is invalid as to wines made in other States, the bond may

be valid, in view of the applications having extended to the sale of spirituous liquors, *Tiernan* v. *Rinker*, 102 U. S. 123, or otherwise, it is unnecessary to inquire.

Judgments affirmed.

Mr. Justice HARLAN, dissenting.

I do not understand that the court modifies the principles announced in *Walling* v. *Michigan*, 116 *U. S.* 446, or in *Connolly* v. *Union Sewer Pipe Co.*, 184 *U. S.* 540. In my judgment, those cases are applicable to and control this case, and require a reversal of the judgment below upon the ground that the statute of Texas is in violation of the Constitution of the United States. I therefore dissent from the opinion and judgment of the court.

Mr. Justice BREWER and Mr. Justice BROWN concur in this dissent.

True copy.

Test:

Clerk Supreme Court, U. S.